DEV KUMAR SRI RAM v. PUUNG KOK PEING

HIGH COURT MALAYA, KUALA LUMPUR
ARZIAH MOHAMED APANDI JC
[CIVIL APPEAL NO: WA-12BNCVC-100-08-2023]
16 APRIL 2024

Abstract – *A commissioned partner in a law firm, who does not share profits or losses and receives a fixed monthly commission, is not liable for the firm's breach of duty as a stakeholder, even if another partner admits to receiving the funds and spending them.*

LEGAL PROFESSION: *Stakeholder – Professional negligence – Breach – Claim by client against law firm and solicitors/partners – Client sold condominium unit and appointed law firm – Law firm failed to release balance purchase price – Admission by one of partners that he utilised balance purchase price – Whether balance purchase price received by law firm – Whether breach of professional negligence as stakeholder established*

EVIDENCE: *Admission – Liability – Claim by client against law firm and solicitors/partners – Client sold condominium unit and appointed law firm – Law firm failed to release balance purchase price – Admission by one of partners that he utilised balance purchase price – Whether balance purchase price received by law firm – Whether admission proved that law firm indeed received balance purchase price – Evidence Act 1950, ss. 17(1) & 22*

PARTNERSHIP: *Liabilities of partner – Legal firm – Professional negligence – Claim by client against law firm and solicitors/partners – Client sold condominium unit and appointed law firm – Law firm failed to release balance purchase price – Admission by one of partners that he utilised balance purchase price – Whether commissioned partner liable for non-release of balance purchase price – Whether commissioned partner 'partner' as defined under s. 3 of Partnership Act 1961*

WORDS & PHRASES: *'partner' – Partnership Act 1961, s. 3 – Definition – Principle expounded in Chooi Siew Cheong v. Lucky Height Development Sdn Bhd*

The appellant ('plaintiff') had sold his condominium unit and had appointed Messrs Yuen & Co ('law firm') to act on his behalf. The first and second defendants were solicitors/partners of the said law firm. The plaintiff had commenced an action against the first and second defendants, at the Sessions Court, for their failure to release to him the balance purchase price of RM920,612.65 ('balance purchase price'). With the first defendant being made bankrupt, the plaintiff went after the respondent ('second defendant'). The plaintiff contended that: (i) from the purchase price of RM1.5 million, certain deductions left the law firm with the sum of RM1,007,612.65 ('initial

balance') at hand, which was payable to him; (ii) the plaintiff had requested that the first defendant pay him the initial balance but the latter admitted to having spent the said amount; (iii) the first defendant only managed to pay RM87,000 before the law firm was dissolved, leaving the balance purchase price, *ie*, RM920,612.65. The second defendant argued that the plaintiff could not prove that the balance purchase price was ever received by the law firm and, with no such proof, the law firm, including the second defendant himself, could not be faulted for any breach of professional negligence in not releasing the balance purchase price to the plaintiff. Dismissing the plaintiff's claim against the second defendant, the Sessions Court held that the second defendant was not liable to pay the balance purchase price as he was merely a commissioned partner without any knowledge nor having profits or losses from the firm. Hence, the present appeal.

Held (dismissing appeal):

(1) The law firm, as a stakeholder of the balance purchase price, owed a duty to the plaintiff to hold on trust the monies received from the purchaser and to release the same to the plaintiff upon the completion of the sale and purchase agreement. The plaintiff's admission that the first defendant had informed him that the latter received the balance purchase price proved that the law firm indeed received the said amount. Section 17(1) of the Evidence Act 1950 ('EA') states that admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, made by any of the persons and under the circumstances mentioned. Section 22 of the EA makes the first defendant's admission to the plaintiff's relevant as to the contents of the ID documents that the balance purchase price was received by the law firm. There was sufficient evidence to admit the ID documents as evidence. The surrounding circumstances from the execution of the SPA until the release of the balance purchase price to the last location of the balance purchase price was with the law firm. The first defendant's admission to the plaintiff, that the balance purchase price was with him and that he had spent it all, coupled with his action in paying in instalments, supported the finding of fact. With the balance purchase price not handed over to the plaintiff, the law firm had breached its duty as a stakeholder. (paras 35, 36 & 41)

(2) Section 3 of the Partnership Act 1961 ('PA') defines 'partner' as (i) persons carrying on a business; (ii) carried out in common; and (iii) to make a profit. The three criteria were affirmed in the Federal Court case of *Chooi Siew Cheong v. Lucky Height Development Sdn Bhd* ('*Chooi*'s case'). It was not proven that the second defendant was a partner in the law firm within the meaning of s. 3(1) of the PA and the

principle expounded in *Chooi*'s case; he did not carry on for profit and was paid a fixed monthly commission. As such, the second defendant was not liable to pay the plaintiff. (paras 43 & 62)

Case(s) referred to:

Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors [2006] 3 CLJ 1 FC ***(refd)***

Alliedbank (Malaysia) Bhd v. Yau Jiok Hua [1998] 2 CLJ 33 HC ***(refd)***

Bank Of Tokyo-Mitsubishi (Malaysia) Bhd v. Sim Lim Holdings Bhd & Ors [2001] 2 CLJ 474 HC ***(refd)***

Brett v. Beckwith (1856) 26 LJ Ch 130 ***(refd)***

China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal [1996] 3 CLJ 163 FC ***(refd)***

Chong Khee Sang v. Phang Ah Cee [1983] CLJU 57; [1983] 1 LNS 57 HC ***(refd)***

Chooi Siew Cheong v. Lucky Height Development Sdn Bhd & Anor [1995] 2 CLJ 11 FC ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Green v. Beesley (1835) 2 Ring NC 108 ***(refd)***

Herrington v. British Railways Board [1972] AC 877 ***(refd)***

Keith Spicer Ltd v. Mansell (1970) 1 All ER 462 ***(refd)***

Malaysian International Trading Corporation (Japan) Sdn Bhd v. Bentini SPA & Ors [2014] 5 CLJ 983 HC ***(refd)***

MEMEC PLC v. The Commissioners of Inland Revenue (1998) STC 753 ***(refd)***

Noakes v. Barlow (1872) 26 LT Ex Ch ***(refd)***

Ooi Yoke In & Anor v. Public Finance Bhd [1993] 2 CLJ 464 HC ***(refd)***

Pooley v. Driver (1876) 5 Ch D 458 ***(refd)***

R v. Robson (1885) 16 QBD 137 ***(refd)***

Saywell v. Pope (Inspector of Taxes) (1979) STC 824 ***(refd)***

Sin-Kung Logistics (KL) Sdn Bhd v. Projek Lebuhraya Usahasama Bhd [2019] 10 CLJ 137 CA ***(refd)***

Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***

Tham Kim Fai v. Ng Kon Seong [2006] CLJU 101; [2006] 1 LNS 101 HC ***(refd)***

Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] CLJU 119; [1979] 1 LNS 119 FC ***(refd)***

UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785 FC ***(refd)***

Walker And Others v. Stones and Another (2011) QB 902 ***(refd)***

Wisniewski v. Central Manchester Health Authority [1998] PIQR 324 ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 17(1), 60, 73A(2), (5), 114(g), 157

Partnership Act 1961, ss. 3(1), 11, 12, 13, 14, 15

For the appellant - Dinesh Nandrajog & Wong Shu Min; M/s Nandrajog
For the respondent - Satish Nair; M/s Satish Alli & Assocs

[Editor's note: Appeal from Sessions Court; Civil Suit No: WA-B52NCVC-471-10-2019.]

Reported by Najib Tamby

A

JUDGMENT
(encl. 1)

Arziah Mohamed Apandi JC:

Introduction

B **[1]** Promises after promises cannot be tolerated longer when the person loses trust and money upon the empty words of payments. A long painful wait ended tragically when he lost the sale proceeds and his condominium unit. Determined to bring the delinquency to justice, he filed this action against the solicitors and law firm that handled the sale transaction.

C **[2]** This appeal concerned the plaintiff as the conveyancing client of the law firm, M/s Yuen & Co ("the law firm") of a sale and purchase transaction of the plaintiff's property to the buyer in 2014. The plaintiff claimed the solicitors and the law firm failed to release him the balance purchase price of RM920,612.65 ("the BPP") received by the law firm. With the first D defendant, Yuen Kwong Wai ("Yuen") being the partner, was made bankrupt in 2016, the plaintiff went after the second defendant (Puung) the other partner of the law firm at the material time.

[3] The plaintiff claimed that the law firm, Messrs Yuen & Co did not E release his BPP of the sale of his property received by the law firm. Despite numerous requests to release the BPP, the plaintiff did not receive it until the law firm was dissolved in 2016. Hence, this claim to get his BPP.

[4] In the court below after a full trial, the learned Sessions Judge ("LSJ") dismissed his claim as the second defendant was not liable to pay the BPP. F Although the second defendant was a partner of the law firm, the second defendant was a commissioned partner without knowledge nor having profits or loss from the law firm. Hence, the appeal herein.

Background Facts

G **[5]** The plaintiff's claim is premised on the outstanding sum of RM920,612.64 being the BPP due under the sale and purchase agreement dated 16 April 2014 ("SPA"). The plaintiff sold his condominium unit in Kiaraville Mon't Kiara, Kuala Lumpur, Parcel A-8-7, Level 8, Type A, Block A together with three parking bays, the postal address A-08-06, Kiaraville Condominium, Jalan Changkat Duta Kiara, Mon't Kiara, 50480 H Kuala Lumpur ("property") to the buyer concerned. The second defendant faced the plaintiff's claim as the second defendant was in a partnership with Yuen in a now-defunct law firm. The law firm was claimed to have breached its fiduciary duties as trustee of the BPP when it failed to release to the plaintiff. With the partnership, Yuen and the second defendant were jointly I and severally liable to make restitution to the plaintiff (encl. 3 pp. 24 to 35 statement of claim). Given that Yuen was bankrupt and his whereabouts unknown, the plaintiff proceeded against the second defendant.

[6] The plaintiff knew Yuen before the SPA transaction. The law firm previously handled the same property matter in 2007 when the plaintiff bought it from the developer. The law firm issued a letter dated 11 March 2007 to him forwarding the property documents for his safekeeping (encl. 4 p. 616). The plaintiff received the original title to the property through the law firm *vide* their letter dated 8 November 2011 (encl. 4 p. 617). As any reasonable person, the plaintiff appointed the law firm again to sell his property to the concerned buyer in 2014. Since he dealt with Yuen before, the plaintiff appointed the law firm to become his solicitor to handle the sale transaction of the property.

[7] Solicitor correspondences between the law firm and the buyer's law firm, Messrs Wilson Leong, Ong & Lean ("the buyer's law firm") were in the letter dated 14 February 2014 from the buyer's law firm showing intention to execute the SPA within the next two weeks (encl. 4 p. 618). Under the SPA, the purchase price of the property was RM1.5 million.

[8] The plaintiff received the earnest deposit payment of RM30,000 on 14 February 2014 from the buyer's law firm. On 6 March 2014, the plaintiff received the balance deposit of RM120,000 from the buyer's law firm. On 24 June 2014, the completion date for the transaction was extended to 23 October 2014. The redemption sum of RM449,560.63 for the purchase was transferred sometime on 16 July 2014 by the buyer's bank, OCBC into the plaintiff's bank, UOB *vide* the buyer's law firm's letter dated 17 July 2014. (encl. 4 pp. 654 to 655). On 20 October 2014, the sum of RM900.439.37 was transferred to the law firm's client's account.

[9] The plaintiff contended that from the purchase price of RM1.5 million, deductions for earnest deposit, redemption sum, and other expenses left the law firm with the sum of RM1,007,612.65 at hand that the plaintiff claimed to be payable to him at that time.

[10] The plaintiff said to have requested many times Yuen to pay him the balance of RM1,007,612 which Yuen promised to pay but did not. In the end, after admitting (in early 2015) that he had spent the BPP, Yuen only managed to pay a total meagre of RM87,000 sometime in September 2015 before the law firm was dissolved in 2016. The balance to be paid was RM920,612.65, *ie*, the BPP.

[11] The dissolution was made under the order of the Advocates and Solicitors Disciplinary Board of the Malaysian Bar on 11 March 2016. Yuen was struck off the Roll as an Advocate and Solicitor of the High Court of Malaya 21 days after the order was proclaimed. Before Yuen's striking off the Rolls, the second defendant had exited the law firm on 8 January 2016. The second defendant was sued by another client of the law firm named *S Kumaraguru* in Case No. B52NCVC-336-08/2015 ("2015 Suit") but the second defendant settled the claim without admission to liability. He paid the plaintiff in the 2015 suit RM140,000 paid by Puung's insurer on 15 December 2016.

[12] It is one of the issues raised by the second defendant that the plaintiff could not prove that the BPP was ever received by the law firm. With no proof, the law firm (including the second defendant himself) could not be faulted for any breach of professional negligence in not releasing the BPP to the plaintiff.

[13] In this appeal, there are two issues namely whether the BPP was received by the law firm; and if so, whether the partners of the law firm were negligent in failing to release to the plaintiff *ie*, whether the second defendant as a partner, is liable to pay the BPP to the plaintiff.

Appellate Intervention

[14] In awareness of the duty of this appellate court, generally, this court will not interfere with the decision of the trial judge who had the advantageous position to make findings of fact and assess the credibility of witnesses, unless there is a clear justification for doing so (see: *Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors* [2006] 3 CLJ 1; [2006] MLJU 647. The appellate will readily interfere if the finding of facts depends upon inference from other facts to form its independent opinion (see: *China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal* [1996] 3 CLJ 163). When the process of reasoning adopted by the trial judge for preferring evidence which was based upon a wrong premise and does not accord with a well-settled principle that goes to the fulcrum upon which the scale of procedural justice turns, such intervention is warranted (see: *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545).

[15] In *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309, Steve Shim CJ (Sabah & Sarawak) (as His Lordship then was) said:

> In our view, the Court of Appeal in citing these cases had borne in mind the central feature of appellate intervention ie, to determine whether or not the trial court had arrived at its decision or finding correctly based on the relevant law and/or the established evidence. In doing so, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. The phrase "insufficient judicial appreciation of evidence" merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention *ie*, that a decision by a trial court without a judicial appreciation of the evidence might be set aside on appeal. This is consistent with the established plainly wrong test.

[16] With that forewarned, I delve into the merits of the appeal below.

Points Of Appeal

[17] For this appeal, the plaintiff's arguments are:

(i) the law firm as the stakeholder of the BPP owed a duty to the plaintiff to hold the BPP on trust and release to the plaintiff upon completion of the SPA. In so failing, the law firm breached its duty as a stakeholder; and

(ii) the second defendant was a partner within the definition of the Partnership Act 1961 ("PA 1961") and should be held liable for any wrongful act/omission of the partnership of the law firm.

[18] While the second defendant's arguments are:

(i) the BPP was not proven to have been paid to the law firm. As such, there is no breach of obligation since the BPP was never received;

(ii) the second defendant ought not be held liable for acts/omission of the law firm because he is not a partner of the law firm and was never involved in the transaction; and

(iii) if the second defendant was a partner under s. 3 of the PA 1961, The second defendant is entitled to rely on s. 15 of the PA 1961 to avoid liability.

[19] This court addressed the first issue of whether the law firm received the BPP to activate the duty as a stakeholder; and the second issue is whether the second defendant as the partner in the law firm was liable to pay the BPP to the plaintiff.

Issues And Analysis Of The Evidence

[20] Altogether five witnesses testified namely three for the plaintiff *ie*, PW2 the plaintiff, PW1 the lawyer of the buyer's law firm in charge of the plaintiff's SPA file and PW3 the officer from the Bar Council Membership Department. Two witnesses for the second defendant *ie*, DW2 the second defendant and DW1 the police officer who investigated Yuen's criminal charge.

[21] The grounds by the LSJ in dismissing the plaintiff's claim are:

(i) that the plaintiff did not prove receipt of the BPP by the law firm as the plaintiff failed to call the relevant witnesses to give evidence;

(ii) since it was unproven that the firm received the BPP, the plaintiff also failed to prove there was a breach of fiduciary duty by the law firm;

(iii) that the second defendant was not a partner under s. 3 of the PA 1961;

(iv) that the plaintiff failed to prove that the second defendant, as a commissioned partner, knew about the sale and purchase transaction of the property; and

A (v) that the second defendant was not liable under ss. 11, 12, 13 and 14 of the PA 1961 for breach of fiduciary duty by the law firm.

Question 1 – Whether The Law Firm Receives The BPP?

[22] Below are the salient evidence from the witnesses:

B (i) PW1 said the BPP was paid into the law firm when the buyer's law firm received notification from the financier on 20 October 2014 indicating the disbursement of loan/financing of RM900,439.37 was transferred into the law firm's client's account on that same day (on 20 October 2014);

C (ii) PW1 said the sale and purchase of the property had been concluded with the BPP paid as there were no further dealings with the law firm after December 2019; and

(iii) PW2 (the plaintiff) did not know how much money was he to receive from the transaction, he did not know how much Yuen had paid him and how much balance was left unpaid, he did not ask the bank or the buyer's law firm if the BPP had been released to the law firm or not, he did not demand his payment (of the BPP) closer to/after the transfer date made on 20 October 2014 but only until nearing the filing of this suit in 2019.

[23] PW2 adduced sufficient documentary and oral evidence to show the law firm received the BPP of RM920,612.65 and failed to release the same to him. In admitting that Yuen told him the law firm received the BPP, PW2 said Yuen promised to pay him. Yuen made staggered payments totalling RM87,000 but Yuen stopped paying from September 2015 onwards. PW2 lodged a police report on 6 September 2017 (exh. P9) (encl. 4 p. 663) followed by this suit in an attempt to recoup his BPP from Yuen.

[24] In his police report, Yuen told him that the law firm received the BPP but Yuen had spent it. I find that the BPP was received by the law firm from the inference of facts that when he made the police report, his memory was still fresh in his mind. Under s. 157 of the Evidence Act 1950 ("EA 1950"), the police report being his former statement may be proved to corroborate his later testimony as to the same fact that the law firm received the BPP. Moreover, Yuen told him that the BPP had been received and Yuen had spent it. Under s. 60 of the EA 1950, this oral evidence is direct that Yuen informed PW2 that Yuen received the BPP.

[25] The chronology of the property purchase started from the law firm's letter to the plaintiff dated 11 March 2007 (encl. 4 p. 616). This was followed by another letter dated 8 November 2011 (encl. 4 p. 617). Then, the purchaser's lawyer's letter came in on 14 February 2014 (encl. 4 p. 618). This came with the earnest payment of RM30,000 for the purchase (encl. 4 p. 619). Then, the deposit was made *vide* the letter dated 6 March 2014

enclosing the cheque for RM120,000 to the plaintiff (encl. 4 pp. 620 to 621). The receipt was given by the law firm (encl. 4 p. 622) and the sale and purchase agreement was executed on 16 April 2014 (encl. 4 pp. 623 to 651). Later, correspondences between the firm and the purchaser's lawyers on 24 June 2014 (encl. 4 pp. 652 to 653), 17 July 2014 (encl. 4 p. 654) and 21 October 2014 (encl. 4 p. 656). The 17 July 2014 correspondence enclosed the OCBC proof of remittance of RM449,560.63 to the plaintiff on 16 July 2014 (encl. 4 p. 655). The email dated 21 October 2014 enclosed OCBC's proof of remittance of RM900,439.37 to the law firm (encl. 4 p. 657).

The ID Documents Should Be Admitted As Evidence

[26] The defendant's persistent objection to admitting the ID documents as evidence was premised on the plaintiff's failure to produce "Hasmah" who was the sender of the email dated 21 October 2014 (encl. 4 p. 656) where it was marked as ID-P6A). The notification letter (encl. 4 p. 657) was marked as ID-P6B since the maker Raymond Su Kok Leong of OCBC was not called to give evidence.

[27] The ID documents are in encl. 4:

(i) page 618 – letter from the buyer's law firm dated 14 February 2014 to the law firm (ID-P1A);

(ii) page 619 – Maybank cheque dated 14 February 2014 No. 714666 for RM30,000 to the law firm (ID-P1B);

(iii) page 620 – letter from the buyer's law firm dated 6 March 2014 from the buyer to the law firm (ID-P1C);

(iv) page 621 – Maybank cheque dated 6 March 2014 No. 714676 for RM120,000 from the buyer to the law firm (ID-P1D);

(iiv) page 622 – official receipts from the law firm to the buyer (ID-P1C & ID-P1D);

(vi) pages 652 to 653 - letter from the law firm dated 24 June 2014 to the buyer's law firm (ID-P4);

(vii) page 654 – letter from the buyer's law firm dated 17 July 2014 to the law firm (ID-5A);

(viii) page 655 – fax from OCBC dated 16 July 2014 to the buyer's law firm (ID-5B)

(ix) page 656 – email from the buyer's law firm dated 21 October 2014 to the law firm (ID-P6A); and

(x) page 657 – letter from OCBC dated 20 October 2014 to the buyer's law firm (ID-P6B).

[28] PW1 produced the originals of the ID documents yet the LSJ refused to admit them as evidence. The correspondence letters between the law firms should be admissible as evidence since originals were produced and the letters were issued under the firm's signatures and not personal signatures except for one letter from the law firm where Yuen signed under his name but still, using the law firm's signature. PW1 was the representative of the buyer's firm and the second defendant was the partner in the law firm when the ID documents were issued. All correspondence letters by these law firms ought to be admitted as evidence by the LSJ.

[29] I find the LSJ failed to weigh these ID documents with the rest of the evidence before deciding to reject them. With that, I have to interfere with the LSJ's finding of fact that I think is wrong when the inference from the facts gathered should be a finding of fact that the law firm received the BPP. The contemporaneous documents showed proof of receipt by the law firm.

[30] Section 73A(5) of the EA 1950 states:

> Section 73A. Admissibility of documentary evidence in civil cases, *etc.*
>
> (5) to decide whether or not a statement is admissible as evidence by subsections (1) to (4), the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a registered medical practitioner, and, where the proceedings are with assessors, the court may in its discretion reject the statement notwithstanding that the requirements of this section are satisfied with respect thereto, if for any reason, it appears to it to be inexpedient in the interests of justice that the statement should be admitted.

[31] I find that the plaintiff had fulfilled the requirements of s. 73A of the EA 1950. The originals were produced and an effort was made to bring the maker, Lester Ong but he was outside Malaysia when the trial started in 2020 until 2021.

[32] The threshold of s. 73A of the EA 1950 was satisfied when the originals were produced in court through PW1. Attempts to locate the maker of the letters *ie*. Lester Ong was futile as he was shown to be abroad (see: immigration confirmation letter – encl. 4 pp. 664 to 665).

[33] The fundamental requirements laid down by the Federal Court in *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785; [2018] Supp MLJ 363 were satisfied. The best evidence rule is that the maker of the document must be called to prove (see: *Alliedbank (Malaysia) Bhd v. Yau Jiok Hua* [1998] 2 CLJ 33. The maker must be called as a witness to admit the document as evidence (see: *Ooi Yoke In (f) & Anor v. Public*

Finance Berhad [1993] 2 CLJ 464. The documents cannot be admitted until it is properly proven (see: *Chong Khee Sang v. Phang Ah Cee* [1983] CLJU 57; [1983] 1 LNS 57). Shankar J (as he then was) in that case remarked that:

(i) a document does not become admissible in evidence merely because it has been handed to the adjudicating offer and marked as an exhibit; and

(ii) a document cannot be admitted into evidence and marked as such until it has been properly proved.

[34] To admit the ID documents under s. 73A(2) of the EA 1950, this court is empowered to exercise its discretion to waive the requirement to call the maker of the document upon satisfaction that undue delay or expense would be caused. Having perused the notes of proceedings and the evidence put forward, I am satisfied that the plaintiff had done all he could reasonably do to produce Leslie Ong who at that material time, was outside Malaysia.

[35] The plaintiff's admission that Yuen informed him he received the BPP proves that the law firm indeed received the BPP. Section 17(1) of the EA 1950 states that admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, made by any of the persons and under the circumstances mentioned. Section 22 of the EA 1950 makes Yuen's oral admission to the plaintiff's relevant as to the contents of the ID documents that the BPP was received from the law firm. There is sufficient evidence to admit the ID documents as evidence (see: *Sin-Kung Logistics (KL) Sdn Bhd v. Projek Lebuhraya Usahasama Bhd* [2019] 10 CLJ 137; [2020] 3 MLJ 800).

[36] The invocation of s. 114(g) of the EA 1950 of the non-production of the makers of the ID documents is improper since there was no entitlement to draw adverse inferences from the absent witnesses. The surrounding circumstances from the execution of the SPA until the release of the BPP point to the last location of the BPP was with the law firm. Yuen's admission to the plaintiff that the BPP was with him and he had spent it all, coupled with Yuen's action in paying in instalments support the finding of fact.

[37] In *Wisniewski v. Central Manchester Health Authority* [1998] PIQR 324, Brooke LJ in *Herrington v. British Railways Board* [1972] AC 877 said:

> From this line of authority, I derive the following principles in the context of the present case:
>
> (1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

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> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.

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[38] Ramli J (as he then was) in *Bank Of Tokyo-Mitsubishi (Malaysia) Bhd v. Sim Lim Holdings Bhd & Ors* [2001] 2 CLJ 474; [2001] MLJU 125 drew flak on the argument that contents of the disputed document as hearsay, thus making it inadmissible. This is what His Lordship said:

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> I just cannot imagine if these things really happened. A solicitor or lawyer who, in his professional capacity has been issuing the notice of demand almost every day has to come to court to testify and produce the said notices of demand as exhibit. Postman, whose ordinary duty is to deliver letters, would also be lining up in the court's witness room waiting to be called to give evidence and to produce all the AR Cards which they had been handling. To my mind, what the defendants wished to achieve through their submission is not practical. Undue delay and expense would be caused.
>
> The notices of demand are issued by solicitors or lawyers on behalf of their clients in their ordinary course of business. The AR Cards and certificates of posting are issued by the postman in their ordinary course of business. To call them to testify in court may cause undue delay or expense which under the circumstances appears to be unreasonable. As such, by section 32(1)(b) of the Evidence Act 1950, the statements contained in those documents are relevant facts.

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[39] PW1 said she joined the bank's law firm in August 2019 where she took conduct of the plaintiff's file. Despite taking over five years after the SPA, the email from OCBC showed the BPP payment was remitted to the law firm on 20 October 2014 (encl. 4 p. 657).

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[40] Premised on the trite law that plausibility should not be mistaken with veracity (see: *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] CLJU 119; [1979] 1 LNS 119; [1979] 2 MLJ 229), I take it that the law firm received the BPP. PW1 is an independent witness who based her testimony on the file records produced in court. I made the finding of fact that the final disbursement of RM900,439.37, *vide* the OCBC's letter, was proven to have been forwarded to the law firm.

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[41] With the BPP not handed over to the plaintiff, the law firm breached its duty as a stakeholder. The law firm as a stakeholder of the BPP owed a duty to the plaintiff to hold on trust the monies received from the purchaser and release the same to the plaintiff upon completion of the SPA.

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[42] The next question is whether the second defendant is liable as a partner of the law firm. A

Q2 – As A partner, Is The Second Defendant Liable To Pay The BPP?

[43] Section 3 of the Partnership Act 1961 (PA 1961) defines "partner" as: (1) persons carrying on a business; (2) carried out in common; and (3) to make a profit. The three criteria were affirmed in the Federal Court case *Chooi Siew Cheong v. Lucky Height Development Sdn Bhd & Anor* [1995] 2 CLJ 11 and High Court case *Tham Kim Fai v. Ng Kon Seong* [2006] CLJU 101; [2006] 1 LNS 101; [2006] 7 MLJ 1. B

[44] A partnership involves a contract between partners to engage in business to make a profit (See: *Green v. Beesley* (1835) 2 Ring NC 108 at p. 112 that the definition of a partnership is mutual participation in profit and loss. C

[45] The definition of profit given by the Cambridge Dictionary is money that is earned in trade or business after paying the costs of producing and selling goods and services. D

[46] A sleeping or dormant partner is where he contributes property/skill/labour or nothing at all (see: *Pooley v. Driver* (1876) 5 Ch D 458). It is always a question of mixed law and fact in determining the existence of partnership (see: *Keith Spicer Ltd v. Mansell* (1970) 1 All ER 462; *Saywell v. Pope (Inspector of Taxes)* (1979) STC 824). E

[47] The business is set up for the sake of making money or obtaining some gain (see: *R v. Robson* (1885) 16 QBD 137). Receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner. If losses and profits are shared then the presumption of partnership is stronger (see: *Green v. Beesley*; *Brett v. Beckwith* (1856) 26 LJ Ch 130; *Noakes v. Barlow* (1872) 26 LT Ex Ch). F

[48] In determining whether the second defendant is liable as partner, ss. 11, 13 and 14 of the Partnership Act 1961 (PA 1961) states: G

> 11. Liability of partners
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> Every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he is a partner; and after his death, his estate is also severally liable in the due course of administration for such debts and obligations, so far as they remain unsatisfied but subject to the prior payment of his separate debts. H
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> 13. Misapplication of money or property received for or in the custody of the firm in the following cases, namely:
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> > 18 (a) where one partner, acting within the scope of his apparent authority, receives the money or property of a third person and misapplies it; and I

A

(b) where a firm in the course of its business receives the money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm, the firm is liable to make good the loss.

14. Liability for wrong joint and several

B

Every partner is liable jointly with his co-partners and also severally for everything for which the firm while he is a partner therein becomes liable under section 12 or 13.

[49] Yuen in his statutory declaration marked exh. D-10 (encl. 4 pp. 658 to 660) declared that the second defendant was a mere commissioned C partner and that he did not hold any equity and/or beneficial interest in the law firm.

[50] Yuen also declared that the second defendant's income was strictly derived from files which he had conducted. He also declared that debts of the law firm are debts owed and payable by him solely. It was not the parties' D intention to make the second defendant a "real" partner of the firm:

(i) DW2 produced Yuen's statutory declaration made in 2015 (encl. 4 pp. 658 to 660) where Yuen declared:

Statutory Declaration

E

I, Yuen Kwong Wai (NRIC No. 650203-10-8213) of full age and a Malaysian Citizen of No. 7B, Jalan Sri Hartamas 2, Taman Sri Hartamas, 50480 Kuala Lumpur, Wilayah Persekutuan do hereby solemnly and sincerely declare as follows:

(a) I am an advocate and solicitor of the High Court of Malaya and am F the managing partner of the law firm of Messrs Yuen & Co of No. 31-2, Jalan Sri Hartamas 7, Taman Sri Hartamas, 50480 Kuala Lumpur ("Messrs Yuen & Co");

(b) Puung Kok Peing, Steven (NRIC No.: 551010-10-5553) ("Steven Puung") is a commissioned partner of Messrs Yuen & Co;

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(c) at all material times, as a commissioned partner, Steven Puung does not hold any equity and/or beneficial interest in Messrs Yuen & Co. His income is derived strictly from files of the firm which he has conducted;

(d) although Steven Puung is a co-signatory to both the office and H clients' accounts of Messrs Yuen & Co, purely to satisfy the requirement of the banks with which the firm has accounts, he does not sign any cheques, except when I am not available and limited to the payments for stamp duties, registration fees, stationeries, and interest due to clients;

I

(e) at all material times, I have the sole and absolute care, custody, and/or control of chequebooks issued by the bankers of Messrs Yuen & Co.;

(f) particularly, including but not limited to conveyancing files, the issuance of cheques is initiated by me solely and absolutely, without the obligation to inform Steven Puung before or after issuance;

(g) at all material times, Steven Puung plays no role in the operation of Messrs Yuen & Co. and all operating expenses, including but not limited to salaries, statutory contributions, utility charges, office rentals, and payments for supplies and services are borne by me solely and absolutely;

(h) debts of Messrs Yuen & Co are debts owed and payable by me absolutely;

(i) file bearing reference number C/Y/SPA(V)/2643/14 for which I had acted for one S. Kumaraguru a/l Somasundram (NRIC NO.: 710827-07-5227/At 986323), ("S Kumaraguru") in the sale of his property to one Rosnah Binti Awang (NRIC No.: 661211- 03-5456/ A0560070), which formed the subject matter of a suit filed by S. Kumaraguru against both Steven The second defendant and I at the Kuala Lumpur Sessions Court under suit no. B52NCVC-336-08/2015, whereby a Judgment In Default has been obtained on 29.9.2015, relates to a matter handled by me for which only I am liable;

(j) all conveyancing files, including but not limited to sale and purchase transactions, loans financing by banks and/or financial institutions, and/or tenancies, whether past, present, or future, in Messrs Yuen & Co, are handled by me for which only I am liable;

(k) litigation files, particularly those bearing reference numbers beginning with "C/Y ..." or "D/YKW ...", which may include petitions for divorce or petitions for the administration of estates, whether past, present or future, in Messrs Yuen & Co, are handled by me for which only I am liable;

(l) all other files not specifically described in paragraphs (j) and (k) above whether past, present, or future are and shall be handled by me and for which only I am liable;

(m) I am personally responsible for all those files mentioned in paragraphs (i), (j), (k) and

(n) above and am and/or shall be personally liable for any damages, losses, claims, proceedings, suits, actions, costs and expenses arising therefrom and I hereby exonerate Steven Puung from any such liabilities, damages, losses, claims, proceedings, suits, actions, costs and expenses which may arise therefrom; and

(o) I hereby undertake to indemnify and keep Steven Puung and/or his personal representatives or assigns, indemnified against all liabilities, damages, losses, claims, proceedings, suits, actions, costs, and expenses arising from my conduct.

A

> And I make this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of the Statutory Declaration Act, 1960.
>
> SUBSCRIBED and SOLEMNLY
>
> DECLARED by the abovenamed]
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> B
>
> YUEN KWONG WAI] signed
>
> At Kuala Lumpur on the 6 NOV 2015] ...
>
> day of 2015.]
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> C
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> Before me,
> Signed
> ...
> Commissioner for Oaths

[51] Yuen had absolved the second defendant from being liable to pay the BPP to the plaintiff in the statutory declaration.

D

[52] In *Tham Kim Fai v. Ng Kon Seong* [2006] CLJU 101; [2006] 1 LNS 101; [2006] 7 MLJ 1:

> [1] A partnership is defined in s. 3(1) of the Partnership Act 1961 ('Act') as 'the relation which subsists between persons carrying on business in
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> common with a view of profit'. And by s. 3(2) of the same Act, it excludes the following forms of company or association which would otherwise fall within the definition and, for brevity, I must now reproduce it verbatim:
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> > This means that, unlike a company, a partnership is simply a relationship governing the rights and duties of the partners and
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> F
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> their relationships with the rest of society. The main difference between a partnership and a company is this. A partnership does not confer any limited liability on the partners. Thus, a partner is liable without limit for the debts incurred by the other partners in the course of the partnership business.
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> G
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> [3] In sharp contrast, perhaps it is ideal to refer to the case of *Smith v. Anderson* [1880] 15 Ch D 247 at 273, CA where James LJ defined "partnership" in a different [2006] 7 MLJ 1 at 6 way. There, this was what His Lordship said (here I would venture to paraphrase it). That an ordinary partnership is a partnership comprised of definite individuals, bound together by contract between themselves to continue for some
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> joint object either during pleasure or during a limited time and it is essentially comprised of the persons originally entering into the contract with one another. That is certainly an old definition of 'partnership' and it is not suitable in the context of our existing Act. But one thing is certain. That a partnership involves a contract between the partners to engage in a business to make a profit. Indeed, Tindal CJ in *Green v. Beesley*
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> [1835] 2 Ring NC 108 at 112 aptly said:

> I have always understood the definition of partnership to be a mutual participation in profit and loss.
>
> ...
>
> [6] It is essential to a partnership that there is a business in existence. Section 2 of the said Act defines 'business' to include every trade, occupation or profession. The basic idea behind the partnership is that the business is set up for the sake of making some money or for obtaining some gain (*R v. Robson* [18851 16 QBD 137). According to s. 4(c) of the said Act, the receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business. However, if losses as well as profits are shared then the presumption of partnership is even stronger (*Green v. Beesley; Brett v. Beckwith* [1856] 26 LJ Ch 130 and *Noakes v. Barlow* [1872] 26 LT 136 Ex Ch).

[53] Mary Lim J (as she then was) in *Malaysian International Trading Corporation (Japan) Sdn Bhd v. Bentini SPA & Ors* [2014] 5 CLJ 983, observed:

> It is interesting to note that the definition of 'partnership' in sub-s 3(1) uses the term "subsists". This infers that the relation must exist as opposed to a mere description of the relation".

[54] Whether at the material time, the second defendant was a partner in the law firm under the definition of "partner" in s. 3(1) of the PA 1961 or any other provisions of the Act.

[55] The plaintiff relied on the letterhead of the law firm, the Bar Council's letter dated 26 December 2019 and PW3's testimony to assert that the second defendant was a partner in the law firm at the material time. Exhibit P-8 contained information collated by the Bar Council but PW3 conceded that she has no document to show the second defendant's application for his practicing certificate to ascertain he was applying as a partner of the law firm at the material time.

[56] The crux issue of this appeal is whether a commission-based partner falls under s. 3 of the PA 1961. In particular, whether s. 3 of the PA 1961 must be interpreted strictly in its literal sense that there can be no differentiation between a commissioned partner with a normal partner or not. Bearing in mind to qualify as a partner, it must be shown that the person has the three criteria namely: (i) persons carrying on a business in common, (ii) to profit and; (iii) intention of the parties.

[57] While it is an agreed fact that both defendants had practised at the law firm at the material time, in the second defendant's witness statement (encl. 3 pp. 68 to 74) he said he was paid a fixed monthly commission on the litigation files he brought to the law firm. He was not in charge of the administration or the finances of the law firm. He just took his commission based on the monthly payments made by his clients. His commission was dependent on his hard work to get his clients to pay the law firm which is independent of the law firm's profit or loss.

[58] The second defendant said all profits made or losses suffered were to Yuen, solely as the second defendant was a commissioned partner who never held any equity or beneficial interest in the law firm. The second defendant's remuneration was only from commissions he earned on the litigation files he brought and handled in the law firm. The second defendant was paid commissions regardless of the volatility of the law firm's profits. The second defendant said he was never paid any profits of the law firm but only commissions derived from his files.

[59] Whether the second defendant, being a commissioned partner as described by Yuen in his statutory declaration (exh. D5) and explained by DW2, possessed the knowledge and/or was involved directly or otherwise, in any transaction involving the plaintiff or his property in the law firm?

[60] The plaintiff said that he first knew Yuen through Yuen's wife who was a former colleague of his. She was the one who introduced Yuen to him since he needed a lawyer to represent him in the sale of the property. The plaintiff had all along dealt with Yuen from the start. For example, Yuen's retainer was not agreed with the second defendant if he was a partner under s. 3 of the PA 1961.

[61] Regardless of whether or not a joint venture business or lawyers practising in a law firm is a partnership, it is settled law that the requirements of s. 3(1) of the PA 1961 must be satisfied. The principle is whether the three criteria in *Chooi Siew Chong* clarified and explained in Malaysian International Trading Corporation (Japan) Sdn Bhd, existed in a partnership. Malaysian International Trading Corporation (Japan) Sdn Bhd found that the true nature of the joint venture in the case was a partnership. The same in the UK Court of Appeal in *MEMEC PLC v. The Commissioners of Inland Revenue* (1998) STC 753.

[62] It was not proven that the second defendant was a partner in the law firm within the meaning of s. 3(1) of the Partnership Act and the principle expounded by the Federal Court in *Chooi Siew Cheong v. Lucky Height Development Sdn Bhd* at the material time.

[63] PW2 said he lodged the police report that implicated Yuen only, not the second defendant. PW2 said he did not know if a legal demand was issued against the second defendant. PW2 said he demanded from Yuen which to him, Yuen represented the law firm.

[64] I note that the plaintiff did not sue the other partner of the law firm *ie*, Edwin Rajasooria who left the law firm only on 1 January 2015 which was after the law firm received the BPP on 20 October 2014. SP2's reason for not roping Edwin Rajasooria in was simply because Yuen was still paying him at that time and he did not see it as a breach until Yuen stopped paying in 2015. I find it odd that the plaintiff selected the second defendant and not Edwin Rajasooria as well.

[65] The plaintiff admitted never dealt with the second defendant before, but only Yuen. The promises to pay were by Yuen, not the second defendant. PW2 said Yuen never mentioned the names of his partner(s) but rather mentioned he has partners and they were doing projects all together. The plaintiff never asked the second defendant for the payment of the BPP or asked anything from him to enable the BPP to be paid to him. The plaintiff did not confront the second defendant for payment of the BPP. Thus, I can infer from the plaintiff's evidence himself that only Yuen was in charge of the SPA transaction.

[66] In the LSJ's grounds of judgment (encl. 5 pp. 27 to 52), the LSJ had carefully analysed all evidence and applied the law appropriately in deciding on the issue of the second defendant as a partner.

[67] I find the evidence proved that the second defendant was not a partner of the firm for profit. The second defendant does not fall under the definition of a partner in s. 3(1) of the PA 1961 as one of the three criteria absent *ie*, intention to make a profit. The second defendant did not fulfil all three criteria *ie*, that the second defendant did not carry on for profit. The second defendant was paid a fixed monthly commission, defendant did not fall under s. 3(1) of the PA 1961 of the "partner" definition. As such, the second defendant is not liable to pay plaintiff.

[68] Since the respondent made an alternative argument that the second defendant is found to be a partner under s. 3(1) of the PA 1961 (which is not), whether the second defendant is entitled to rely on s. 15 of the PA 1961 to avoid liability on the basis that the second defendant had no knowledge and/or was involved directly or otherwise, in the sale of the property and/or in the receipt of the BPP by the law firm.

[69] For argument's sake, if the second defendant is found to be a "partner" under s. 3(1) of the PA 1961, the second defendant is entitled to rely on s. 15 PA 1961 since the evidence showed he had no knowledge and/or was not involved in the SPA matter of the plaintiff.

[70] A look at s. 15 of the PA 1961 on the improper employment of trust property for partnership purposes states:

> If a partner being a trustee, improperly employs trust property in the business or on the account of the partnership, no other partner is liable for the trust property to the persons beneficially interested therein:
>
> Provided as follows:
>
> (a) this section shall not affect any liability incurred by any partner because of his having notice of a breach of trust; and
>
> (b) nothing in this section shall prevent trust money from being followed and recovered from the firm, if still in its possession or under its control.

[71] The plaintiff failed to show that the second defendant acted as a trustee to the BPP in his capacity as a partner in the law firm. There was no evidence showing the second defendant knew about the BPP and acted with/without Yuen in managing the BPP. The plaintiff failed to show that the second defendant had the fiduciary duty as trustee to manage the BPP, thus the plaintiff failed to show any breach of fiduciary duty on the second defendant. What was shown to the court is that the second defendant did not know about the BPP and what more to handle and manage the BPP to be paid to the plaintiff. With that, the second defendant is protected under s. 15 of the PA 1961 since he did not know of Yuen's alleged breach of trust of the BPP.

[72] In the UK Court of Appeal case *Walker And Others v. Stones And Another* (2011) QB 902 the judgment mentioned: "I would accordingly accept the argument advanced on behalf of Wiggin & Co that the legislature in enacting s. 10 (our s. 12) of the 1890 Act, treated breaches of trust committed by a trustee-partner as falling outside the ordinary business of any partnership and correspondingly incapable of giving rise to vicarious liability under that section. I see no other way reconciling ss. 10 and 11 with s. 13 (our s. 15), as a matter of construction, without an interpolation of additional words to s. 13 which would in my judgment be unnecessary and unjustified'.

[73] DW1 said Yuen was charged in court under s. 409 of the Penal Code for criminal breach of trust of client's money. The complainant was one Law Hwi Chow. The criminal court issued a warrant of arrest on Yuen but failed to execute it as Yuen could not be located. Yuen was found guilty *in absentia* and convicted on the charge. Yuen was sentenced to eight years imprisonment and with fine of RM50,000 with failure to pay being two years imprisonment. Yuen is still at large.

[74] The second defendant did not receive and cannot be deemed to have received the BPP as trustee; and had no obligation to forward the BPP to the plaintiff as he was not a trustee of the same or deemed as such; did not cause and cannot be deemed to have caused any breach of the terms of a trustee.

[75] The plaintiff did not ask DW2 on this issue of trustee and neither did he lead any evidence to prove that the second defendant was a trustee of the BPP received by the law firm and that the second defendant had breached his fiduciary duty by not releasing it to the plaintiff. The second defendant should not be held liable as he is entitled to seek the protection of s. 15 of the PA 1961 as he did not improperly employ the BPP and did not have notice of Yuen's alleged breach of trust of the BPP.

[76] Section 15 of the PA 1961 makes the second defendant unaccountable for the plaintiff's claim and denies that he had breached his duty/obligation as trustee and/or committed a breach of trust in his capacity as a lawyer.

[77] Only Yuen is responsible for paying the BPP sum claimed by the plaintiff, in view that Yuen received and wrongfully utilised, failed, refused and/or neglected to pay the same to the plaintiff. The second defendant was never in the capacity of a fiduciary/trustee of the property for the plaintiff in the sale and purchase transaction and did not commit any breach of fiduciary duty in his practice. Loss and damage purportedly suffered by the plaintiff cannot be attributed to the second defendant.

Analysis Of The Findings By LSJ

[78] I am reminded of the judgment by Steve Shim CJ (Sabah & Sarawak) (as His Lordship then was) in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309 where the appeal was dismissed:

> In our view, the Court of Appeal in citing these cases had borne in mind the central feature of appellate intervention ie, to determine whether or not the trial court had arrived at its decision or finding correctly based on the relevant law and/or the established evidence. In doing so, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. The phrase "insufficient judicial appreciation of the evidence" merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and for good reasons, either accepting or rejecting the whole or any part of the reiterated the principle central to appellate intervention *ie*, that a decision arrived at by a trial court without a judicial appreciation of the evidence might be set aside on the appeal. This is consistent with the established plainly wrong test.

[79] Save for the wrong inference made by the LSJ on the BPP received by the law firm, which I find there was such receipt by the law firm, the rest of the LSJ's decision is affirmed. The second defendant cannot be liable to pay the plaintiff the BPP since he did not fall under the s. 3(1) of the PA 1961 definition of a "partner" as he did not enter into the partnership for profit.

[80] I sympathise with the plaintiff's predicament in losing his money and property. But, the real culprit is still out there to be held accountable.

Decision

[81] With that, this appeal by the plaintiff is dismissed with no order as to costs.